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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CLARENCE JAMES et al., Defendants and Appellants.	B210090 (Los Angeles County Super. Ct. No. SA062684)

APPEAL from judgments of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed.

Christine C. Shaver, under appointment by the Court of Appeal, for Defendant and Appellant Clarence James.

Tara Hoveland, under appointment by the Court of Appeal, for Defendant and Appellant Carnell Wingfield.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael R. Johnsen and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants, Clarence James and Carnell Wingfield, appeal the judgments entered following their conviction, by jury trial, for premeditated attempted murder (4 counts) and shooting at an occupied vehicle, with firearm, great bodily injury (James only) and gang enhancement findings (Pen. Code, §§ 664/187, 246, 12022.53, 12022.7, 186.22).[1] The defendants were sentenced to state prison for terms of 145 years to life (James) and 92 years to life (Wingfield).

The judgments are affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

a. *The shooting.*

On August 6, 2006, L.G., his two young children, his girlfriend Adriana, his 16-year-old sister Layla, and his friend Theodore, were visiting friends on Casamir Avenue in Hawthorne. At one point, Layla, the children, and Adriana went to buy some food. They returned just after 8:30 p.m. and sat in the car waiting for the others. Theodore and L.G. came out of the house and got into the car. L.G. sat in the driver's seat. Adriana was in the front passenger seat, and Theodore and Layla were in the back seat with the two children between them.

Just as L.G. was about to put the key in the ignition, a mid-1990's car pulled up next to him. He saw two African-American men inside. The passenger suddenly fired five or six gunshots at L.G.'s car. No words were exchanged prior to the shooting. One of the first shots hit Layla in the face. The bullet entered her left temple and exited the right side of her nose. The gunfire stopped and the car drove off. Layla was hospitalized and survived.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

Police found six .45-caliber bullet casings on the ground at the shooting scene.

b. *The investigation.*

By speaking to a Hawthorne detective about the shooting, Sheriff's Detective Michael Valento learned it had occurred at a known hangout for the Watergate gang.

On October 8, 2006, Sergeant John Kepley of the Los Angeles County Sheriff's Department responded to a report about a gang gathering at a bowling alley on Western Avenue. A group of people in gang attire, including defendant Wingfield, were standing at the rear entrance. Kepley shone his spotlight on the group and ordered them to show their hands. Wingfield lifted up his sweatshirt, removed a handgun from his waistband, and ran into the bowling alley. Kepley followed. Wingfield went into the men's bathroom, came out 15 seconds later, and was detained. Kepley searched the bathroom and found a loaded .45-caliber handgun under the sink.

The following day, Detectives Todd Anderson and Barry Hall interviewed Wingfield at the police station. Wingfield denied knowing anything about the gun in the bowling alley bathroom. The detectives asked him about the murder of Steven Hicks, an affiliate of the Watergate Crips gang who had been killed with a .45-caliber gun in the Hawthorne area two months earlier. Wingfield said he did not know anything about the Hicks murder.

Leaving Wingfield at the station, the detectives drove to his house and searched his bedroom. They found a box of .45-caliber ammunition in a false ceiling. They found items suggesting Wingfield was affiliated with the Crips: blue bandannas, blue tennis shoes with blue laces, and a blue Yankees cap. There was a dark-colored 1996 Mercury Sable parked at the house. When the detectives returned to the station, they told Wingfield about finding the .45-caliber ammunition. Wingfield then said the gun police recovered from the bowling alley

was his. He explained he had just come into possession of it, having traded his old .45 and $200 to another gang member for it.[2]

On December 21, 2008, police searched the home of defendant James and recovered a box of .45-caliber ammunition and two handguns from his bedroom, one of which was a .45-caliber Ruger. James claimed to have found the guns just three weeks earlier. Detective Valento asked James about the murders of Hicks and Darrell Roberts, a member of the Neighborhood Crips who had been killed by a .45-caliber gun on October 1, 2006. James denied any involvement in those killings and said he knew about them only from talk on the street.

The detectives then asked James about the shooting in this case. Using a ruse, they said Wingfield had already told them all about it. The detectives said they knew James had been the passenger and Wingfield had been driving, that they had pulled up next to the victims' car, and that James had shot a girl in the face with a .45-caliber handgun. James claimed he only knew Wingfield slightly as a friend of his older brother.

James initially said he was not a gang member, but later admitted he was a member of the 111 Neighborhood Crips. He was new to the gang and had not yet completed his training period. A detective testified this meant he had not yet fulfilled his obligation to put in work, i.e., to commit crimes, for the gang. James said Wingfield was a member of the 115 Neighborhood Crips.

James initially denied having ever been in Wingfield's car, but when the detectives implied they had already found his fingerprints, James admitted he had been in the car.

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[2] It turned out the gun from the bowling alley was not connected to either the shooting in this case or to the Hicks shooting.

c. *The jailhouse conversation.*

Following this interview, James was taken to the Twin Towers jail and put into a holding cell with Wingfield for three hours. Their ensuing conversation was surreptitiously recorded. During this conversation, James and Wingfield revealed their culpability for the August 6, 2006, attack on the occupants of L.G.'s car. The following excerpts indicate the tenor of their conversation:

James says the detectives are connecting Wingfield to a drive-by shooting and he asks, "How the fuck they know everything cuz? . . . Did you tell them anything cuz?" Wingfield denies having said anything to the detectives: "I didn't tell . . . nigger, they got me on some bull . . . look, this what they got me on cuz. Remember, ah, Stephen Hicks?" (Elipses in original.) "Nigga, they said I killed him, when the bitch['s] boyfriend killed cuz. They got me on that."

James says, "Cuz, you or somebody cuz, had to say something . . . ." James says that, when the police picked him up, he "was playing stupid like I don't know shit, but cuz they sayin everything word by word what the fuck we did." Wingfield replies, "They . . . ain't got a gun. That's all I'm worried about. But they didn't get the gun? [¶] [James]: Ya, they didn't get the gun cuz." Wingfield also says he "dumped the car." Later, Wingfield says, "My car is long gone. That shit is in the junk yard. You feel me? I got rid of my car." "The car is long gone. They ain't got no evidence on us."

But James, still suspicious of Wingfield, insists: "You had to say something." Wingfield denies it, saying the two of them would not have been put into the same cell if one of them had been snitching on the other.

When James again expresses concern that Wingfield has been talking to the police, Wingfield replies: "[T]hink logically cuz, if I woulda said something cuz, if I woulda opened my mouth, they woulda had you in October cuz." Wingfield reassures James, "Without no murder weapon cuz, without the murder weapon cuz, they can't say shit."

They talk about the fact the detectives asked both of them about the Darrell Roberts murder and Wingfield remarks, "When [Roberts] got killed? You was in jail."

But James is still worried because the police seem to know "[w]ord for word . . . everything that fuckin happened," "how we sat right there waited till niggers came to the car, how we rolled up on a nigga, how that bitch[3] was like aaahhh." When James asks, "[H]ow the fuck they know that," Wingfield says, "Shhh, shhh, that's what I'm saying, they don't know word for word." Wingfield again tries to reassure James: "All this shit is gonna be beat. . . . [F]irst off I'm not telling on you," and "[y]ou're not telling on me." Wingfield says he got rid of his car and, therefore, "They gonna have no evidence that's what I'm tryin' to tell you. They ain't got no evidence cuz. The only thing they got is the nigger in the backseat[4]. . . nigger in the backseat gave up some shit, feel me?"

James says, "All that shit they was tellin' me cuz seemed like you were snitchin' cuz," but Wingfield replies, "[T]hat's what they want you to think," and "C'mon, if I'm snitchin' on you, I'm telling on myself."

When Wingfield suggests people in the neighborhood have been talking to the police, James replies, "[O]nly me and you know cuz, ain't nobody from the hood know this shit word by word like that cuz . . . ." James worries the police know he was the gunman: "Look cuz, they know what happen cuz, they don't got you for a murder cuz they got you for uh, accessory for murder, but . . . they know I did it cuz . . . they know I did it, they said it word for word cuz what happen that night cuz." When Wingfield says, "If I was snitchin on you, it's like I'm tellin on myself," James replies: "Not really" because "you ain't the shooter . . . you was just the driver homie."

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[3] An apparent reference to Layla.

[4] An apparent reference to Theodore.

In one exchange, James denies having killed Hicks: "[Wingfield]: You killed Stephen? [¶] [James]: Hell no nigger." When James says the police accused him and Wingfield of having killed Hicks, Wingfield replies, "On Stephen Hicks, I know I didn't kill Stephen Hicks." Wingfield later says that Darrell Roberts "got killed by the Watergates."

Wingfield keeps trying to reassure James: "They ain't got no proof that we did shit. That's why they try to use us against each other, so make sure one of us talk."

d. *Additional investigation.*

After listening to the tape recording of the jail house conversation between James and Wingfield, Detective Valento ran a computer check on the Mercury Sable that had been parked outside Wingfield's house. Valento discovered the car had been sold to an auto salvage business. The manager of the auto salvage company testified the Sable had been brought to the company on November 2, 2006. The car was dismantled and destroyed.

On January 3, 2007, five months after the shooting, Detective Leonard Luna showed Layla two six-pack photo arrays. James was pictured in one array and Wingfield in the other. Layla could not make any identifications. Luna then had Layla go into another room while he showed the photo arrays to L.G.. When Layla returned, she told Luna she had been having nightmares about the shooting and that one of the people in the photo arrays was someone she had seen in her nightmares. Luna showed Layla the photo arrays again and she identified Wingfield as the person she had seen in her dreams.

e. *Gang evidence.*

Detective Valento testified as a gang expert. He said the Neighborhood Crips gang had several cliques, including the 111's and the 115's. Those two cliques had about 120 to 130 members. The primary rivals of the Neighborhood Crips were the Watergate Crips, the Avenue Piru Bloods, and the Hoover Criminals.

In Valento's opinion, both Wingfield and James were members of the Neighborhood Crips. This opinion was based on their statements to police as well as the tape recorded jail conservation. It was well known to the Neighborhood Crips that members of the Watergate Crips lived at the house on Casamir Avenue where the shooting took place. This house had been previously shot at and firebombed.

Based on a hypothetical question that was consistent with the evidence, Detective Valento opined the instant shooting had been committed for the benefit of the Neighborhood Crips. The shooting served to affirm the violent reputation of the gang and bolstered the status of the individual gang members who committed it.

2. *Defense evidence.*

Wingfield's mother testified that, on the day of the shooting, he came home between 6:00 and 7:00 p.m. and stayed home for the rest of the evening. Wingfield's sister testified he had been home after 7:30 p.m. that evening. On cross-examination, both witnesses acknowledged they had waited almost a year before telling authorities Wingfield could not have been involved in the shooting.

James did not present any evidence.

CONTENTIONS

1. The trial court erred by failing to adequately redact jailhouse recordings in which the defendants incriminated themselves.

2. The trial court erred by excluding testimony from an eyewitness identification expert.

3. The trial court erred by imposing consecutive sentences.

DISCUSSION

1. *The jailhouse tape recordings were properly redacted.*

Defendants contend that, by not adequately redacting the jailhouse tape recordings, the trial court violated Evidence Code section 352 because it admitted evidence that was more prejudicial than probative. They argue most of the information on the tapes was irrelevant and that the tapes also "contained cumulative evidence, inadmissible hearsay, and improper character evidence." This claim is meritless.

a. *Proceedings below.*

During discussions regarding how much and which parts of the jailhouse tapes to redact, the trial court reasoned general references to the defendants' gang activities were relevant to prove both their motive for the shooting and the elements of the gang enhancement. The court pointed out, "Generally in these types of cases, when the officers talk about the motive for these otherwise inexplicable gang-related shootings, they talk about how it somehow increases their stature in the gang" but that the jury is "kind of left with this officer's opinion based on his contacts and experience and talking to other people. [¶] In this particular case, [the defendants have] accomplished more clearly than the detective ever could that whole concept."

The trial court concluded the references to the Steven Hicks shooting and the other killings were relevant because, on the tapes, the defendants vigorously denied any involvement in those crimes while implicating themselves in the charged shooting. However, the court ruled it would let the jurors hear about the other shootings only if they were told the defendants had been accused of those crimes as a ruse to get them to talk about this case, and that in fact there was no evidence linking them to those other crimes.

The trial court ruled it would redact references to the defendants being on probation, and references to the shooting of a police officer. One reason for redacting the latter references was that they were not as intertwined with the entire jailhouse conversation as were the references to the Hicks shooting.

b. *Discussion.*

" '[W]hen an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers "substantially outweigh" probative value, the objection must be overruled. [Citation.] On appeal, the ruling is reviewed for abuse of discretion.' [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008.) " 'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is . . . 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]' " (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) This prejudice "applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual . . . ." (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

The trial court here did not abuse its discretion when it declined to further redact the jailhouse tapes. The references to the Hicks murder and the other killings were highly probative because they were a key part of the detectives' interrogation ruse. The detectives led the defendants to believe, erroneously, that they were suspected of having committed those other crimes, principally the Steven Hicks murder, in order to elicit inculpatory statements about the shooting in this case. The ruse was successful and a key aspect of the defendants' incriminating statements was the *contrast* between the way they talked about the two sets of crimes.

There was little risk of undue prejudice. The prosecution never claimed the defendants had anything to do with those other shootings. The jury was specifically

instructed that neither defendant was a suspect in the Hicks murder.[5] Moreover, these references to other killings were not particularly inflammatory when compared to the evidence about how Layla was shot in the face when the defendants ambushed L.G.'s car. (See *People v. Kipp* (1998) 18 Cal.4th 349, 372 [risk of prejudice "was not unusually grave" where the prior "crimes were not significantly more inflammatory than the [current] crimes"]; *People v. Yovanov* (1999) 69 Cal.App.4th 392, 406 [evidence of prior child molestations not highly inflammatory where "the evidence concerning the charged offenses was equally graphic"].)

Defendants' references to their gang activities were highly probative; they furnished a motive for an otherwise inexplicable crime and helped prove the elements of the gang enhancement. (See *People v. Ruiz* (1998) 62 Cal.App.4th 234, 239 [notwithstanding potential prejudicial effect of gang evidence, such evidence is admissible "when the very reason for the crime is gang related"]; *People v. Martin* (1994) 23 Cal.App.4th 76, 81 ["where evidence of gang activity or membership is important to the motive, it can be introduced even if prejudicial"].)

We conclude the trial court did not abuse its discretion by refusing to make more extensive redactions of the jailhouse tapes. The information on the tapes was relevant and the defendants have not demonstrated it was cumulative, or that it consisted of inadmissible hearsay or improper character evidence.

2. *Trial court did not err by excluding eyewitness identification expert.*

Defendants contend the trial court erred by precluding Wingfield from calling an eyewitness identification expert. This claim is meritless.

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[5] Far and away, the Hicks murder was the other shooting most frequently referred to in the jailhouse tapes. There were a few references to the Roberts shooting and the shooting of someone at a park.

a. *Factual background*.

Layla testified that, shortly after the shooting, she began having a recurring nightmare about the incident. Although she described the dream as "[b]asically, a replay of what happened that night, the shooting," it was quite different from the actual event. She dreamed she was sitting in L.G.'s car with two men she did not know: "In the dream one [of the men] was in the front passenger seat [next to L.G.] and one was sitting next to me in the backseat. And through the shooting, the one that was sitting next to me in the back was staring at me the whole time in the shooting." "Q. What, if anything, did they do in that dream? [¶] A. Nothin'. [¶] Q. Just – [¶] A. Just sat there, staring directly at me while they[6] were shooting."

Layla testified that, after being unable to make an identification from the photo arrays on January 3, 2007, she went into another room while L.G. looked at the photographs. In the other room, Layla realized she had seen one of the faces in her recurring nightmare: "I remembered my dream, and I remembered one of the faces on that paper." Layla returned to the other room and informed the detectives, who had her look at the photo arrays again. This time, she identified Wingfield as the person she had seen in her dream. On cross-examination, Layla acknowledged she had not seen anyone at the time of the shooting: "Q. I think you said something to the effect that you didn't see anybody at the time of the shooting; is that correct? [¶] A. Correct. He was just in my dream. [¶] Q. Just in your dream? [¶] A. Yes." Wingfield's attorney asked Layla if she saw either of the two strangers from her dream in the courtroom. Layla said she could see one of them and, very reluctantly, she indicated it was Wingfield.[7]

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[6] It is unclear if "they" refers to the two strange men inside L.G.'s car, or to the perpetrators who, in the dream, came up to the car and started shooting.

[7] "The Court: Which one is it? [¶] The witness: I don't want – [¶] By [defense counsel]: Layla, it's just your dream. [¶] A. I understand that, and that means a whole lot. [¶] The Court: I'm not sure it does or it doesn't, but you need to answer the question."

Arguing in support of putting on Dr. Shomer, the proposed expert witness, defense counsel asserted his testimony would be relevant to challenge the accuracy of L.G.'s trial description of one light-skinned perpetrator and one dark-skinned perpetrator, as well as Layla's identification of Wingfield in the photo array after having told police, at the time of the shooting, that she could not identify anyone.

The trial court replied, "The problem I'm having . . . is that the eyewitness identification expert . . . is gonna come in and talk in general principles. [¶] Nobody was I.D.'d in this . . . case. Nobody was. Frankly, if you would have objected to the testimony relating to seeing this guy in her dreams, I would have sustained it. But there was no objection, so it's out there. [¶] I don't know what you are gonna make of it. I guess the argument is subconsciously she saw the shooter even though she has no recollection of it. Now, I think that's quite a stretch. But in a case where there is no identification by either of the witnesses that have testified . . . and in a case which rests largely on statements or admissions, I don't see how it is relevant."

When defense counsel argued it was relevant because Layla "said in court that my client was in that vehicle," the trial court corrected him: "No. In her dreams he was in that vehicle, in her dreams. She said in court she did not see the occupants of the other car. I assumed that the reason why this was being offered, again without objection, was that somehow this is proof that subconsciously she actually did see the guy, though she has no recollection of it. [¶] . . . [I]t's clear to me she said she did not see who the shooters are. [¶] I assume the only argument of relevance is that this man suddenly appears in her dreams. There he is, one of the shooters. Since she has no other contact with him – I don't know. But the bottom line, despite that piece of flaky evidence floating out there, it doesn't make Dr. Shomer's testimony relevant as to eyewitness identification based on that testimony alone. [¶] She does not I.D. him as being one of the shooters. She does not I.D. him as being in the car, except . . . during her dream."

During closing argument, the prosecutor argued Layla's dream constituted inculpatory evidence: "[R]ight around January 3rd Layla . . . identifies [Wingfield] in her dreams. Never seen him before, never knew him before this incident. [¶] What I think happened was I think she saw a little more than she wanted to believe. I think when the car pulled up, she probably looked at the car, saw [Wingfield], and got shot in the head. I think subconsciously she saw who it was in the car. [¶] What are the chances . . . that a person that she sees in her dreams, she never had seen before this incident, now she has nightmares about him?"

During his rebuttal closing argument, the prosecutor said: "The other point [defense counsel] brings up, Layla . . . and the dream, and it's not an I.D. I agree with that. If we were here and all we had was [Layla's] I.D.'ing his client in a dream, we'd never be here. We couldn't stand up and say it must be him because she had a dream with him. Absolutely not. Nobody is saying that. [¶] All I'm saying is there's a pretty strong chance that she saw a little more than she thinks she saw. Because right after this incident, she sees [Wingfield] in her dreams. She sees him in the car next to her, seated right next to her inside the car. [¶] And think about it. That's the same person who's in this jail cell saying, oh, that shit in the summertime, we don't have to worry about it. There's no evidence on this. Don't worry. The bitch is dead." "So what are the chances that she I.D.'s someone who's making those statements in the jail cell?"

b. *Legal principles.*

The admission of expert eyewitness identification evidence is a matter for the trial court's discretion. (*People* v. *Walker* (1988) 47 Cal.3d 605, 627-628.) The exclusion of such evidence may be an abuse of discretion if " 'an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury.' " (*Id*. at p. 628.)

People v. McDonald (1984) 37 Cal.3d 351, disapproved on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 915, is the seminal case in this area. *McDonald* reversed a conviction after finding the trial court erred by excluding the testimony of a defense expert concerning problems inherent in eyewitness identifications: "It is doubtless true that from personal experience and intuition all jurors know that an eyewitness identification can be mistaken, and also know the more obvious factors that can affect its accuracy, such as lighting, distance, and duration. It appears from the professional literature, however, that other factors bearing on eyewitness identification may be known only to some jurors, or may be imperfectly understood by many, or may be contrary to the intuitive beliefs of most. For example, in the case at bar Dr. Shomer would have testified to the results of studies of relevant factors that appear to be either not widely known to laypersons or not fully appreciated by them, such as the effects on perception of an eyewitness' personal or cultural expectations or beliefs [citation], the effects on memory of the witness' exposure to subsequent information or suggestions [citation], and the effects on recall of bias or cues in identification procedures or methods of questioning [citations]." (*People v. McDonald, supra*, at pp. 367-368, fn. omitted.)

McDonald reasoned: "[A]lthough jurors may not be totally unaware of the foregoing psychological factors bearing on eyewitness identification, the body of information now available on these matters is 'sufficiently beyond common experience' that in appropriate cases expert opinion thereon could at least 'assist the trier of fact' (Evid. Code, § 801, subd. (a))." (*People v. McDonald, supra*, 37 Cal.3d at p. 369, fn. omitted.)

c. *Discussion.*

Wingfield argues the expert should have been allowed to testify because "[n]umerous factors . . . adversely affected the accuracy of the eyewitness identification testimony" of L.G. and Layla: "the incident was stressful; the perpetrator had a gun; it was dark and the perpetrators were in a car. Further, Layla claimed at the time of the shooting that she did not see the perpetrators, but five months later identified appellant in a six-pack photographic line-up. Moreover, L.G.'s description at trial almost two years later . . . was more precise than [his] description at the time of the offense." Wingfield asserts the eyewitness identifications were such "a critical element of the prosecution's case" that "the prosecutor focused on it in closing argument."

This last point is incorrect. The prosecutor talked about the identification evidence for less than two pages out of a 62-page closing argument. Moreover, the inculpatory value of L.G.'s testimony, i.e., that the two perpetrators were African-Americans, one of whom had darker skin than the other, was inconsequential.

However, we do not agree with the Attorney General's argument "that Layla's 'identification' of appellant Wingfield as a person in her *dream* who was sitting in [L.G.'s] car had minimal probative value because Layla reiterated that this identification was limited to the dream context and that she did not actually see anyone at the time of the shooting."

This argument ignores the popular, Freudian-based belief that this is one of the ways in which the unconscious operates: we can perceive things without retaining a conscious memory of what we perceived, although the perception leaves a memory trace in our unconscious. Hence the controversy over recovered-memory testimony.[8] Hence, too, the power of the prosecutor's closing argument in this case, in which he acknowledged Layla had only identified a dream figment, not a real person, but still argued rather effectively that this was significant. As the trial court

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[8] See, e.g., *Taus v. Loftus* (2007) 40 Cal.4th 683.

remarked when it was deciding whether to allow the expert, "[S]omehow this is proof that subconsciously she actually did see the guy, though she has no recollection of it." In these circumstances, an expert witness might have had something relevant to tell the jury. (See, e.g., *Brown v. Terhune* (N.D.Cal. 2001) 158 F.Supp.2d 1050, 1071 ["At the first trial, counsel called Dr. Lee Coleman as an expert witness to testify about the effect of dreams on memory"].)

Nevertheless, we conclude the trial court did not abuse its discretion by excluding Dr. Shomer as a witness. This was proper under *McDonald* because Layla's "identification" was corroborated by the far more inculpatory evidence of the jailhouse tapes. *McDonald* found error where "an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (*People v. McDonald, supra,* 37 Cal.3d at p. 377.) Here, on the other hand, the critical inculpatory evidence was clearly the jailhouse tape recordings which laid bare the defendants' involvement in the shooting.

Hence, we agree with the Attorney General's assertion that, "as the trial court . . . correctly explained, the crux of the prosecution's case was based on the highly inculpatory statements that appellants made in their recorded jail conversation rather than any eyewitness identification evidence. Accordingly, the trial court correctly determined that Dr. Shomer's testimony was not relevant because eyewitness identification was not a major issue at trial."

The trial court did not abuse its discretion by excluding the defense expert's testimony.

3. *Consecutive sentencing was proper*.

Defendants contend the trial court abused its discretion by sentencing them to consecutive life terms on their premeditated attempted murder convictions. This claim is meritless.

Section 669 provides a trial court with discretion to impose either consecutive or concurrent prison terms: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. Life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or with any other term of imprisonment for a felony conviction."

"It is well established that a trial court has discretion to determine whether several sentences are to run concurrently or consecutively. [Citations.] In the absence of a clear showing of abuse, the trial court's discretion in this respect is not to be disturbed on appeal. [Citation.] Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) "[I]n the absence of a clear showing that its sentencing decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate sentencing objectives and, accordingly, its discretionary determination to impose consecutive sentences ought not be set aside on review." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

James asserts, "Although the [trial] court appeared to understand it had discretion to sentence appellant to concurrent terms, it appeared there was some confusion." Not so. There is no question the trial court was aware it had discretion to impose either concurrent or consecutive terms. After one of the defense attorneys argued "the court has discretion, and in this case I would urge the court to

use that discretion" to impose concurrent terms, the trial court said, "I agree with counsel that the court has discretion, it's not mandatory that I impose consecutive sentence[s] . . . ."

The defendants cite California Rules of Court, rule 4.425(a)(3), which provides that "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences include" such crime-related factors as whether "[t]he crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." The defendants argue this case falls into the latter category.

But this argument ignores California Rules of Court, rule 4.425(b), which implicitly embraces a multiple victim rule by providing, in pertinent part, that "[a]ny circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences . . . ." As explained by *People v. Calhoun* (2007) 40 Cal.4th 398: "California Rules of Court, rule 4.421 provides, 'Circumstances in aggravation include facts relating to the crime,' whether or not charged or chargeable as enhancements. Before 1991, rule 421(a)(4) provided that one of these facts was that '[t]he crime involved multiple victims.' Effective January 1991, this factor was deleted from the rule. The advisory committee comment noted, 'Former subdivision (a)(4), concerning multiple victims, was deleted to avoid confusion; cases in which that possible circumstance in aggravation was relied on were frequently reversed on appeal because there was only a single victim in a particular count.' Defendant does not argue that deletion of the factor precludes the trial court's reliance on it. Rule 4.408(a) provides, 'The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria must be stated on the record by the sentencing judge.' " (*Id.* at pp. 405-406, fns. omitted.)

In *Calhoun*, the defendants had been drag racing when one of them hit the victims' vehicle. Explaining why the multiple victim factor applied to the sentencing of the defendant who crashed into the victims, *Calhoun* said: "Waller's single act of violence caused either the death or serious injury of four people. The gravity of and his culpability for this offense is increased by the number of those he harmed. ' "A defendant who commits an act of violence . . . by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person." ' [Citation.] He is therefore properly subject to increased punishment for each gross vehicular manslaughter count. [¶] Nor should the trial court's sentencing discretion be limited, as Waller suggests, to imposing consecutive sentences. There is no persuasive reason why the trial court should not be allowed to consider the fact of multiple victims as a basis for imposing either the upper term or a consecutive sentence, although it cannot do both. [Citation.]" (*People v. Calhoun*, *supra*, 40 Cal.4th at p. 408; see also, *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1784 ["The multiple victim exception, simply stated, permits one unstayed sentence per victim of all the violent crimes the defendant commits incidental to a single criminal intent"].)

The trial court here pointed out the evidence showed the defendants had intended to shoot everyone in L.G.'s car, "so I see that as being separate acts of violence, separate victims" meriting consecutive terms. "I understand that when you start talking about the numbers it almost gets to be absurd. However, the conduct of these defendants at the time, the choices they made in their lives, the devotion to their gang, and the motivations for the shooting and the circumstances of it, I'm constrained, I believe, even though I understand I had the discretion to do so, but I believe that the law contemplates and that I should impose consecutive sentences on all these counts."

The trial court did not abuse its discretion by sentencing the defendants to consecutive terms.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.